



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R10-OAR-2019-0647; FRL-10975-02-R10]

Air Plan Approval; WA; Excess Emissions, Startup, Shutdown, and Malfunction Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving State Implementation Plan (SIP) revisions submitted by the State of Washington, through the Department of Ecology on November 12, 2019. The revisions were submitted by Washington in response to EPA's June 12, 2015 "SIP call" in which EPA found a substantially inadequate Washington SIP provision providing affirmative defenses that operate to limit the jurisdiction of the Federal court in an enforcement action related to excess emissions during startup, shutdown, and malfunction (SSM) events. EPA's approval of the SIP revisions removes the substantially inadequate provision which corrects the deficiency identified in the 2015 SSM SIP call. Washington withdrew some portions of the revisions submitted that were not identified in the 2015 SSM SIP call and therefore EPA is not taking final action on those withdrawn portions.

DATES: This final rule is effective **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-R10-OAR-2019-0647. All documents in the docket are listed on the <https://www.regulations.gov> web site. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information or other information the disclosure of which is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy

form. Publicly available docket materials are available at <https://www.regulations.gov>, or please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

FOR FURTHER INFORMATION CONTACT: Randall Ruddick, EPA Region 10, 1200 Sixth Avenue (Suite 155), Seattle WA, 98101, (206) 553-1999, ruddick.randall@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document wherever “we” or “our” is used, it means the EPA.

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I. Background

On June 15, 2023 (88 FR 39210), EPA proposed to approve several SIP revisions submitted by the State of Washington, through the Washington State Department of Ecology on November 12, 2019. In that proposal, we also proposed to determine that one of the SIP revisions, the removal of WAC 173-400-107, corrects the deficiency with respect to Washington that we identified in our June 12, 2015 action entitled “State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA’s SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction” (“2015 SSM SIP call”) (80 FR 33839, June 12, 2015).¹ The

¹ The term “SIP call” refers to the requirement for a revised SIP in response to a finding by the EPA that a SIP is “substantially inadequate” to meet CAA requirements pursuant to CAA section 110(k)(5), titled “Calls for plan revisions.”

remaining SIP revisions submitted with the request to remove WAC 173-400-107 on November 12, 2019, were not subject to the 2015 SSM SIP call. The reasons for our proposed approval and determination can be found in the proposed action and will not be fully restated here (88 FR 39210, June 15, 2023).

II. Public Comments and EPA Responses

The EPA's proposed action provided a 30-day public comment period which ended on July 17, 2023. We received one set of comments from the public signed by representatives of the Sierra Club and Environmental Integrity Project. The full text of the comments is available in the docket for this rulemaking. Issues raised in the comments, and our responses are summarized below.

A. Removal of WAC 173-400-107.

WAC 173-400-107 was the only provision identified as deficient for Washington State Department of Ecology in the 2015 SSM SIP call. The commenters agreed that removal of WAC 173-400-107 from the SIP would satisfy the 2015 SSM SIP call. EPA acknowledges the commenter's support and is finalizing the removal of WAC 173-400-107 in this action. As stated in our proposed approval (88 FR 39210, June 15, 2023), EPA's removal of the provision providing for an affirmative defense corrects the deficiency identified in our 2015 SSM SIP call regarding the Washington State Department of Ecology. The remaining SIP revisions submitted with the request to remove WAC 173-400-107 on November 12, 2019, were not subject to the 2015 SSM SIP call.

B. WAC 173-400-040, General Standards for Maximum Emissions.

The commenters "generally agree that Washington's proposal is generally an improvement over the current SSM exemptions" but also raised several concerns regarding the revisions to WAC 173-400-040 that we proposed to approve. On December 12, 2023, the State withdrew those revisions from its November 12, 2019,

submittal via letter to EPA.² Accordingly, EPA is not taking final action on those revisions and therefore is not responding to the portions of the comment regarding WAC 173-400-040 in this action.

Washington also withdrew three analogs to WAC 173-400-040, specifically: WAC 173-405-040(6)(b), WAC 173-410-040(3)(b), and WAC 173-415-030(3)(b). Accordingly, EPA is not finalizing the proposed approval of these withdrawn provisions. Should these or other revisions be submitted to EPA for approval, EPA will publish an additional proposed rule and provide an opportunity for public comment prior to taking any final action on them.

The 2015 SSM SIP call did not obligate Washington to make or submit any revisions other than removing WAC 173-400-040. Accordingly, approval of the remaining revisions as well as the withdrawal of some of them do not affect the disposition of Washington's obligation under the 2015 SSM SIP call. As stated above and in our proposed approval, the portion of the November 12, 2019, removing WAC 173-400-107 from the SIP and the State regulations is fully responsive to the 2015 SSM SIP call and no further action is required to satisfy the 2015 SSM SIP call.

C. WAC 173–400–081, Emission limits during startup and shutdown.

Comment. The commenters claim that this provision does not comport with “[t]he first criterion of EPA’s seven for approving AELs [alternative emission limitations]” as it is not “limited to specific, narrowly defined source categories using specific control strategies.”³ The commenters assert “[s]ource-specific alternative emission limitations, generally, are not proper.” The commenters also assert “the source-by-source approach that Washington is taking here ‘could lead to inconsistent alternative limits for sources that should probably have similar alternative limits for startup or shutdown,’” citing a

² See *104 state submittal Withdrawal Letter 12-14-2023.pdf* which is included in the docket for this action.

³ 2015 SSM SIP call, 80 FR 33840, June 12, 2015.

Federal Register notice in which EPA proposed disapproval of AELs submitted for approval into the West Virginia SIP.⁴ The commenters also assert that “a source-by-source approach makes it difficult to consider the cumulative impact of all the source-specific emission limitations on air quality.”

Response. As stated in the 2015 SSM SIP call, EPA believes there will be limited cases where it may be necessary to develop source-specific emission requirements for startup and or shutdown. WAC 173-400-081 merely establishes a pathway for such limited cases as may be necessary. Any source-specific emission limits developed pursuant to this provision must go through the SIP approval process and any comments on actual emissions limits could be raised during those individual rulemaking actions. Therefore, EPA believes the commenters’ concerns are premature regarding whether any future AELs submitted through this process would meet the recommended criteria in the 2015 SSM SIP call. Moreover, EPA has acknowledged that source-specific AELs could be appropriate in some limited circumstances, so we disagree that merely establishing a pathway for developing such AELs and revising the SIP accordingly is inconsistent with the 2015 SSM SIP Call.

We also disagree that EPA’s prior disapproval of West Virginia’s AELs, as referenced by the commenters, supports disapproval here. EPA disapproved West Virginia’s submittal primarily because the provisions at issue would have provided the State with discretion to create source-specific AELs without submitting those AELs to EPA for approval into the SIP. EPA further identified the concern that West Virginia’s AEL process “could lead to inconsistent alternative limits for sources that should probably have similar alternative limits for startup and shutdown.”⁵ However, in light of the fact that the SIP revision process for the AELs created pursuant to WAC 173-400-081

⁴ See 87 FR 78617, December 22, 2022.

⁵ See 87 FR 78620, December 22, 2022.

allows both EPA and any concerned members of the public an opportunity to identify any alleged inconsistencies, those concerns are not applicable here. For the aforementioned reasons and those stated in our proposed approval, EPA is finalizing approval of this provision.

IV. Final Action

EPA is approving and incorporating by reference in the Washington SIP at 40 CFR 52.2470(c) revisions to WAC 173-400-030, 173-400-070, 173-400-081, and 173-400-171 (State effective 9/16/2018); revisions to 173-405-040, 173-410-040, and 173-415-030 (State effective 5/24/2018); the addition of WAC 173-400-082 (State effective 9/16/2018); and the removal of 173-405-077, 173-410-067, and 173-415-070. This approval is consistent with the exceptions requested by the State in the November 5, 2019, submittal as described in the proposal for this action and set forth in the amendments to 40 CFR part 52 below. This approval is also consistent with the State's withdrawal of certain revisions as described in the State's December 14, 2023, letter. In addition, this action removes provision WAC 173-400-107 – identified as inconsistent with CAA requirements – from the Washington SIP thereby correcting the deficiency identified in our 2015 SSM SIP call with respect to Washington State Department of Ecology.

Once this approval becomes effective, changes to WAC 173-400 will apply specifically to the jurisdictions of Washington Department of Ecology and Benton Clean Air Agency. Under the applicability provisions of WAC 173-405-012, WAC 173-410-012, and WAC 173-415-012, BCAA does not have jurisdiction for kraft pulp mills, sulfite pulping mills, and primary aluminum plants. For these sources, Washington Department of Ecology retains statewide, direct jurisdiction over these sources.

Once this approval becomes effective, the Washington SIP will include the following regulations:

- WAC 173-400-030, Definitions (State effective 9/16/2018) – Establishes definitions used throughout Chapter 173-400 WAC;
- WAC 173-400-070, Emission Standards for Certain Source Categories (State effective 9/16/2018) – sets forth maximum allowable standards for emissions units within the categories listed;
- WAC 173-400-081, Emission Limits during Startup and Shutdown (State effective 9/16/2018) – establishes pathway for developing emissions limits that apply during startup and shutdown;
- WAC 173-400-082, Alternative Emission Limit That Exceeds an Emission Standard in the SIP (State effective 9/16/2018) – establishes pathway for an owner or operator to request an alternative emissions limit;
- WAC 173-400-171 Public Involvement (State effective 9/16/2018) – sets forth certain requirements for public involvement;
- WAC 173-405-040, Emission Standards (State effective 5/24/2018) – sets forth certain emission standards for kraft pulping mills;
- WAC 173-410-040, Emission Standards (State effective 5/24/2018) – sets forth certain emission standards for sulfite pulping mills;
- WAC 173-415-030, Emission Standards (State effective 5/24/2018) – sets forth certain emission standards for primary aluminum plants.

Once this approval becomes effective, the Washington SIP will no longer include the following regulations:

- WAC 173-400-107, Excess Emissions – established a pathway to determine excess emissions unavoidable, excuse them from penalty, and certain instances preclude them from being considered violations;
- WAC 173-405-077, Report of Startup, Shutdown, Breakdown or Upset Conditions – established applicability of WAC 173-400-107 for kraft pulping

mills;

- WAC 173-410-067, Report of Startup, Shutdown, Breakdown or Upset Conditions – established applicability of WAC 173-400-107 for sulfite pulping mills;
- WAC 173-415-070, Report of Startup, Shutdown, Breakdown or Upset Conditions – established applicability of WAC 173-400-107 for primary aluminum plants.

VI. Incorporation by Reference

In this document, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of regulatory provisions described in section II of this preamble and set forth in the amendments to 40 CFR part 52 in this document. The EPA has made, and will continue to make, these materials generally available through <https://www.regulations.gov> and at the EPA Region 10 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by the EPA for inclusion in the SIP, have been incorporated by reference by the EPA into that plan, are fully federally enforceable under sections 110 and 113 of the Clean Air Act as of the effective date of the final rule of the EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.⁶

VII. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Clean Air Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve State choices, provided that they meet the criteria of the

⁶ 62 FR 27968 (May 22, 1997).

Clean Air Act. Accordingly, this action merely approves State law as meeting Federal requirements and does not impose additional requirements beyond those imposed by State law. For that reason, this action:

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001); and
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act.

Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, February 16, 1994) directs Federal agencies to identify and address “disproportionately high and adverse human health or environmental effects” of their actions on minority populations and low-

income populations to the greatest extent practicable and permitted by law. The EPA defines environmental justice (EJ) as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” The EPA further defines the term fair treatment to mean that “no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.”

The air agency did not evaluate environmental justice considerations as part of its SIP submittal; the Clean Air Act and applicable implementing regulations neither prohibit nor require such an evaluation. The EPA did not perform an EJ analysis and did not consider EJ in this action. Due to the nature of this action, it is expected to have a neutral to positive impact on the air quality of the affected area. Consideration of EJ is not required as part of this action, and there is no information in the record inconsistent with the stated goal of Executive Order 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

In addition, the SIP is not approved to apply on any Indian reservation land in Washington except as specifically noted below and is also not approved to apply in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law. Washington’s SIP is approved to apply on non-trust land within the exterior boundaries of the Puyallup Indian Reservation, also known as the 1873 Survey Area. Under the Puyallup Tribe of Indians Settlement Act of 1989, 25 U.S.C. 1773, Congress explicitly provided State and local agencies in Washington authority over activities on non-trust lands within the 1873

Survey Area. Consistent with EPA policy, the EPA provided a consultation opportunity to potentially affected tribes in a letter dated May 24, 2022.

This action is subject to the Congressional Review Act, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. See section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference,
Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter,
Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: December 18, 2023.

Casey Sixkiller,
Regional Administrator, Region 10.

For the reasons set forth in the preamble, 40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart WW—Washington

2. In § 52.2470:

a. Amend paragraph (c), table 1 by:

- i. Revising entries “173-405-040” and “173-410-040”;
- ii. Removing entries “173-405-077” and “173-410-067”;
- iii. Revising entry “173-415-030”; and
- iv. Removing entry “173-415-070”.

b. Amend paragraph (c), table 2 by:

- i. Revising entry “173-400-030”;
- ii. Removing entry “173-400-030 (30) and (36)”;
- iii. Revising entries “173-400-070” and “173-400-081”;
- iv. Adding entry “173-400-082” in numerical order;
- v. Removing entry “173-400-107”; and

vi. Revising entry “173-400-171”; and

c. Amend paragraph (c), table 4 by:

i. Revising entry “173-400-030”;

ii. Removing entry “173-400-030 (30) and (36)”;

iii. Revising entries “173-400-070” and “173-400-081”;

iv. Adding entry “173-400-082” in numerical order;

v. Removing entry “173-400-107”; and

vi. Revising entry “173-400-171”.

The revisions and additions read as follows:

§ 52.2470 Identification of plan.

* * * * *

(c) * * *

Table 1 – Regulations Approved Statewide

[Not applicable in Indian reservations (excluding non-trust land within the exterior boundaries of the Puyallup Indian Reservation) and any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction.]

State citation	Title/subject	State effective date	EPA approval date	Explanations
Washington Administrative Code, Chapter 173-405 – Kraft Pulping Mills				
*	*	*	*	*
173-405-040	Emissions Standards	5/24/19	[Insert date of publication in the Federal Register], [Insert Federal Register citation]	Except: 173-405-040(1)(b); 173-405-040(1)(c); 173-405-040(3)(b); 173-405-040(3)(c); 173-405-040(4); 173-405-040(6)(b).
*	*	*	*	*
Washington Administrative Code, Chapter 173-410 – Sulfite Pulping Mills				

*	*	*	*	*	*	*
173-410-040	Emissions Standards	5/24/19	[Insert date of publication in the <u>Federal Register</u>], [Insert <u>Federal Register</u> citation]	Except: 173-410-040(3)(b); 173-410-040(5).		
*	*	*	*	*	*	*
Washington Administrative Code, Chapter 173-415 – Primary Aluminum Plants						
*	*	*	*	*	*	*
173-415-030	Emissions Standards	5/24/19	[Insert date of publication in the <u>Federal Register</u>], [Insert <u>Federal Register</u> citation]	Except: 173-410-030(1); 173-410-030(3)(b).		
*	*	*	*	*	*	*

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**Table 2 – Additional Regulations Approved for Washington Department of Ecology
(Ecology) Direct Jurisdiction**

[Applicable in Adams, Asotin, Chelan, Columbia, Douglas, Ferry, Franklin, Garfield, Grant, Kittitas, Klickitat, Lincoln, Okanogan, Pend Oreille, San Juan, Stevens, Walla Walla, and Whitman counties, excluding facilities subject to Energy Facilities Site Evaluation Council (EFSEC) jurisdiction, Indian reservations (excluding non-trust land within the exterior boundaries of the Puyallup Indian Reservation), and any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. These regulations also apply statewide for facilities subject to the applicability sections of WAC 173-400-700, 173-405-012, 173-410-012, and 173-415-012]

State citation	Title/subject	State effective date	EPA approval date	Explanations
Washington Administrative Code, Chapter 173-400 -- General Regulations for Air Pollution Sources				
*	*	*	*	*
173-400-030	Definitions	9/16/18	[Insert date of publication in the <u>Federal Register</u>], [Insert <u>Federal Register</u> citation]	Except: 173-400-030(96).

* * * * *				
173-400-070	Emission Standards for Certain Source Categories	9/16/18	[Insert date of publication in the <u>Federal Register</u>], [Insert <u>Federal Register</u> citation]	Except: 173-400-070(5); 173-400-070(6).
* * * * *				
173-400-081	Emissions Limits During Startup and Shutdown	9/16/18	[Insert date of publication in the <u>Federal Register</u>], [Insert <u>Federal Register</u> citation]	
173-400-082	Alternative Emissions Limit That Exceeds an Emission Standard in the SIP	9/16/18	[Insert date of publication in the <u>Federal Register</u>], [Insert <u>Federal Register</u> citation]	
* * * * *				
173-400-171	Public Notice and Opportunity for Public Comment	9/16/18	[Insert date of publication in the <u>Federal Register</u>], [Insert <u>Federal Register</u> citation]	Except: The part of 173-400-171(3)(b) that says, <ul style="list-style-type: none"> “or any increase in emissions of a toxic air pollutant above the acceptable source impact level for that toxic air pollutant as regulated under chapter 173-460 WAC”; 173-400-171(12).
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Table 4 – Additional Regulations Approved for the Benton Clean Air Agency (BCAA) Jurisdiction

[Applicable in Benton County, excluding facilities subject to Energy Facilities Site Evaluation Council (EFSEC) jurisdiction, Indian reservations and any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction, and facilities subject to the applicability sections of WAC 173-400-700, 173-405-012, 173-410-012, and 173-415-012]

State / local citation	Title/subject	State / local	EPA approval date	Explanations
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		effective date		
*	*	*	*	*
Washington Department of Ecology Regulations				
Washington Administrative Code, Chapter 173-400—General Regulations for Air Pollution Sources				
*	*	*	*	*
173-400-030	Definitions	9/16/18	[Insert date of publication in the <u>Federal Register</u>], [Insert <u>Federal Register</u> citation]	Except: 173-400-030(40); 173-400-030(41); 173-400-030(96).
*	*	*	*	*
173-400-070	Emission Standards for General Process Units	9/16/18	[Insert date of publication in the <u>Federal Register</u>], [Insert <u>Federal Register</u> citation]	Except: 173-400-070(5); 173-400-070(6).
*	*	*	*	*
173-400-081	Emissions Limits During Startup and Shutdown	9/16/18	[Insert date of publication in the <u>Federal Register</u>], [Insert <u>Federal Register</u> citation]	
173-400-082	Alternative Emissions Limit That Exceeds an Emission Standard in the SIP	9/16/18	[Insert date of publication in the <u>Federal Register</u>], [Insert <u>Federal Register</u> citation]	
*	*	*	*	*
173-400-171	Public Notice and Opportunity for Public Comment	9/16/18	[Insert date of publication in the <u>Federal Register</u>], [Insert <u>Federal Register</u> citation]	Except: The part of 173-400- 171(3)(b) that says, <ul style="list-style-type: none"> “or any increase in emissions of a toxic air pollutant above the acceptable source impact level for that toxic air pollutant as regulated under chapter 173-460 WAC”; 173-400-171(12).

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[FR Doc. 2023-28294 Filed: 12/27/2023 8:45 am; Publication Date: 12/28/2023]